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SERVICE DATE - AUGUST 22, 2001

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-33 (Sub-No. 180X)

UNION PACIFIC RAILROAD COMPANY--ABANDONMENT
EXEMPTION--IN SHAWNEE COUNTY, KS

Decided: August 20, 2001

Union Pacific Railroad Company (UP) filed a notice of exemption under 49 CFR 1152 Subpart F--Exempt Abandonments and Discontinuances of Service and Trackage Rights to abandon a 1.07-mile line of railroad over the Topeka Industrial Lead from milepost 406.53 to milepost 407.60 in Topeka, Shawnee County, KS. Notice of the exemption was served and published in the Federal Register on July 26, 2001 (66 FR 39082-83). The exemption is scheduled to become effective on August 25, 2001.

The Board's Section of Environmental Analysis (SEA) served an environmental assessment (EA) in this proceeding on July 31, 2001. In the EA, SEA states that the State of Kansas Department of Wildlife & Parks (KDWP) recommends that UP use appropriate erosion controls and reseeding with the native grasses during salvage operations. KDWP also states that, if construction is started within one year and no design changes are made in the project plans, no permits or special authorization will be needed. KDWP goes on to state, however, that if construction has not started within that time period, or if design changes are made in the project plan, UP should be required to contact KDWP to verify continued applicability of this assessment report because KDWP's recreational land obligation and the State's species listings periodically change. Therefore, in response to these concerns, SEA recommends that UP consult with the KDWP prior to engaging in salvage operations.

SEA also states that the National Geodetic Survey (NGS) has identified four geodetic station markers that may be affected by the proposed abandonment. NGS requests that it receive not less than 90 days' notification in advance of any salvage activities in order to plan for their relocation. Therefore, SEA recommends that a condition be imposed requiring UP to consult with the NGS and provide NGS with 90 days' notice prior to disturbing or destroying any geodetic station markers in order to plan for their relocation.

Finally, SEA states that the U.S. Army Corps of Engineers, Kansas City District (Corps), has indicated that, if the abandonment requires discharge of dredge or fill material in any waters, including wetlands, a Department of the Army permit will be required. Therefore, SEA recommends that a condition be imposed, requiring UP to consult with the Corps prior to engaging in any salvage activities to determine if permits are necessary.

SEA also indicates that the right-of-way may be suitable for other public use following abandonment. By petition filed August 14, 2001, the City of Topeka, KS (City) late-filed a request for the issuance of a notice of interim trail use (NITU) for the entire line under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act),¹ and for a public use condition under 49 U.S.C. 10905, in order to negotiate with UP for acquisition of the right-of-way for use as a trail. The City requests that UP be prohibited from disposing of the corridor, other than the tracks, ties, and signal equipment, except for public use on reasonable terms, and that UP be barred from removing or destroying any trail-related structures, such as bridges, trestles, culverts and tunnels, for a 180-day period from the effective date of the abandonment exemption. The City states that the time period is needed because it has not begun negotiations with UP. The City has submitted a statement of willingness to assume financial responsibility for the management of, for any legal liability arising out of the transfer or use of (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability), and for payment of any and all taxes that may be levied or assessed against, the right-of-way, as required at 49 CFR 1152.29, and has acknowledged that the use of the right-of-way for trail purposes is subject to future reactivation for rail service. On August 15, 2001, UP indicated its willingness to negotiate with the City for interim trail use.

Because the City's request complies with the requirements of 49 CFR 1152.29 and UP is willing to negotiate for trail use, a NITU will be issued. The parties may negotiate an agreement during the 180-day period prescribed below. If the parties reach a mutually acceptable final agreement, no further Board action is necessary. If no agreement is reached within 180 days, UP may fully abandon the line. See 49 CFR 1152.29(d)(1). Use of the right-of-way for trail purposes is subject to restoration for railroad purposes.

As an alternative to interim trail use under the Trails Act, the right-of-way may be acquired for public use as a trail under 49 U.S.C. 10905. See Rail Abandonments—Use of Rights-of-Way As Trails, 2. I.C.C.2d 591, 609 (1986). Under section 10905, the Board may prohibit the disposal of rail properties that are proposed to be abandoned and are appropriate for public purposes for a period of not more than 180 days after the effective date of the decision approving or exempting the abandonment.

¹ The City states that it sent its request by certified mail on August 2, 2001, but that the envelope was incorrectly addressed, and it was therefore returned to its office on August 13, 2001. The July 26, 2001 notice of exemption provided that trail use/rail banking requests had to be filed by August 6, 2001. In Aban. and Discon. of R. Lines and Transp. Under 49 U.S.C. 10903, 1 S.T.B. 894 (1996) and 2 S.T.B. 311 (1997), however, the Board retained the policy of accepting filings after the due date when good cause is shown. Because there is no indication that the City's late-filed request will prejudice any party, it will be accepted. See Wheeling & Lake Erie Railway Company—Abandonment Exemption—in Starke County, OH, STB Docket No. AB-227 (Sub-No. 10X), slip op. at 1 n.1 (STB served Nov. 7, 1997).

To justify a public use condition, a party must set forth: (i) the condition sought; (ii) the public importance of the condition; (iii) the period of time for which the condition would be effective; and (iv) justification for the imposition of the period requested. See 49 CFR 1152.28(a)(2). The City has satisfied these requirements and, therefore, a 180-day public use condition will be imposed commencing with the effective date of the exemption.

When the need for interim trail use/rail banking and public use is shown, it is the Board's policy to impose both conditions concurrently, subject to the execution of a trail use agreement. If a trail use agreement is reached on a portion of the right-of-way, UP must keep the remaining right-of-way intact for the remainder of the 180-day period to permit public use negotiations. Also, a public use condition is not imposed for the benefit of any one potential purchaser, but rather to provide an opportunity for any interested person to acquire the right-of-way that has been found suitable for public purposes, including trail use. Therefore, with respect to the public use condition, UP is not required to deal exclusively with the City, but may engage in negotiations with other interested persons.

As conditioned, this decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. This proceeding is reopened.
2. Upon reconsideration, the exemption of the abandonment of the line described above is subject to the conditions that UP shall: (a) consult with the KDWP prior to salvage operations; (b) consult with NGS and provide NGS with 90 days' notice prior to disturbing or destroying any geodetic markers; and (c) consult with the Corps to determine if permits are necessary prior to salvage activities.
3. The notice served and published in the Federal Register on July 26, 2001, exempting the abandonment of the line described above is modified to the extent necessary to implement interim trail use/rail banking as set forth below, subject to the conditions that UP keep intact the right-of-way underlying the tracks, including bridges, trestles, culverts and tunnels, for a period of 180 days from the effective date (until February 21, 2002), to enable any state or local government agency, or other interested person to negotiate the acquisition of the line for public use. If an interim trail use/rail banking agreement is executed before expiration of the 180-day period specified above, the public use condition will expire to the extent that the trail use/rail banking agreement covers the same line.
4. If an interim trail use/rail banking agreement is reached, it must require the trail user to assume for the term of the agreement, full responsibility for management of, for any legal liability arising out of the transfer or use of (if the user is immune from liability, it need only

indemnify the railroad against any potential liability), and for the payment of any and all taxes that may be levied or assessed against, the right-of-way.

5. Interim trail use/rail banking is subject to the future restoration of rail service and to the user's continuing to meet the financial obligation for the right-of-way.

6. If interim trail use is implemented, and subsequently the user intends to terminate trail use, it must send the Board a copy of this decision and notice and request that it be vacated on a specified date.

7. If an agreement for interim trail use/rail banking is reached by February 21, 2002, interim trail use may be implemented. If no agreement is reached by that time, UP may fully abandon the line.

8. This decision is effective on its service date.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams
Secretary